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No. 06-6407

In the
Supreme Court of the United States

SCOTT PANETTI,
Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS*

The American Bar Association ("ABA") is the principal voluntary national membership organization of the legal profession. Its more than 413,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and non-lawyer "associates" in allied fields.[1]

The criminal justice system's treatment of individuals with mental illness is a longstanding ABA concern. The ABA first began to investigate the nature of criminal responsibility and the insanity defense in 1935 and created a "Special Committee on the Rights of the Mentally Ill" in 1945.

In the 1980's, in collaboration with disability and clinical professional groups, the ABA studied criminal justice issues affecting defendants with mental disabilities. The Association developed *Criminal Justice Mental Health Standards,* now incorporated into the ABA *Standards for Criminal Justice*. In August 2006, the ABA adopted and

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[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the *amicus*, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. In addition, the parties have consented to the filing of *amicus* briefs in this matter.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

reaffirmed policies concerning various aspects of mental disability and the death penalty.

The ABA takes no position on the advisability of the death penalty *per se*, but has a deep interest in the fairness and integrity of the criminal justice system. Thus, the ABA has a unique and informed perspective to offer as *amicus* on the narrow issue before this Court, as well as a keen interest in this case.

SUMMARY OF ARGUMENT

The ABA has considered extensively the question of competency for execution of mentally ill offenders and has developed policy that accords with its understanding of what the Constitution requires.

The Association has concluded that execution of a mentally ill offender should occur only if the offender "not only . . . [is] 'aware' of the nature and purpose of punishment but also . . . 'appreciate[s]' its personal application in the offender's own case -- that is, why it is being imposed *on the offender*." Report in Support of Resolution 122A (Aug. 2006)(emphasis in original).[2]

The court below held that a death row inmate who, due to a serious mental disability, suffers from the delusion that the actual reason he is to be executed has nothing to do with his crime is nevertheless competent to be executed. To survive constitutional scrutiny, however, capital punishment must serve

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[2] Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, August 2006, 30:5 Mental and Physical Disability Law Reporter 668, 675 (September-October 2006).

the purpose of retribution. The Fifth Circuit's holding breaks that link because it does not require that the offender have any understanding of the reason he is being put to death -- that is, of the retributive purpose of his execution.

ARGUMENT

I. ABA Policy On Competency For Execution Is Informed By The Retributive Purpose of Capital Punishment

In considering the issue of competency for execution of mentally ill inmates, the ABA has endeavored to shape its standards in accordance with its understanding of what the Constitution requires. In examining this question, the ABA has looked to *Ford v. Wainwright*, 477 U.S. 399 (1986), and in particular the thoughtful concurrence by Justice Powell, who cast the deciding vote and provided the most specific articulation of how the Constitution bears on this issue.

Justice Powell emphasized that "one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence *and purpose*." He concluded "that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 421, 422 (Powell, J., concurring)(emphasis added).

The year after the *Ford* decision, an interdisciplinary ABA task force developed ABA Criminal Justice Standard 7-5.6,[3]

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[3] *See* http://www.abanet.org/crimjust/standards/mental health_blk.html#7-5.6. Criminal Justice Standard 7-5.6 and the (continued...)

concerning competency for execution. Adopted in 1987, this standard reflects the ABA's considered view of how best to satisfy Justice Powell's articulation of constitutional requirements.

ABA Standard 7-5.6(b) provides that an offender is incompetent for execution if, among other things, he "cannot understand . . . the reason for his punishment." ABA Criminal Justice Standard 7-5.6(b).[4] The accompanying Commentary states that this standard requires, as the minimum measure of competence for execution, that the offender have a "rational understanding . . . of the penalty that is about to be imposed . . .." ABA Criminal Justice Standard 7-5.6(b) cmt.[5]

Recently, the ABA considered this subject again, in an exhaustive, multi-disciplinary review. The ABA-created task force of lawyers and mental health professionals that undertook the review concluded, as the ABA had in 1987, that Justice Powell's formulation in *Ford* is most consistent with what this Court has deemed a core purpose of capital punishment: retribution. Indeed, the task force stressed that "the primary purpose of the competence-to-be-executed requirement is to

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[3] (...continued)
accompanying Commentary are available at pages 290-93 of the Mental Health Standards, http://www.abanet.org/crimjust/standards/mentalhealth.pdf. The Standard is set forth in Appendix A hereto.

[4] This concept was familiar from *Dusky v. United States*, 362 U.S. 402, 402 (1960), using a competence standard (in the context of waiver) requiring, *inter alia*, "a rational as well as factual understanding of the proceedings."

[5] See footnote 3, *supra*, at 291.

vindicate the retributive aim of punishment . . .." Report in Support of Resolution 122A (Aug. 2006).[6]

The task force then considered whether Justice Powell's view could be reduced to a standard containing a greater degree of specificity than the 1987 standard. The policy it developed reaffirms and elaborates on the approach of Criminal Justice Standard 7-5.6(b). The ABA adopted the policy in 2006.[7] The American Psychological Association[8] and the American Psychiatric Association[9] have adopted this same policy (except for a minor variation not relevant here).

The 2006 ABA policy states that a death row inmate is incompetent for execution if he "has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case . . .." ABA Resolution 122A (Aug. 2006), par. 3(d). Someone "who lacks a meaningful understanding that the state is taking his life in order to hold him accountable for taking the

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[6] See footnote 2, *supra*, at 675.

[7] See footnote 2, *supra*, at 668, par. 3(d). The policy is set forth in Appendix B hereto.

[8] *See* American Psychological Association, Council Policy Manual: N. Public Interest - Part 2, VIII.2, par. 3(d) (Feb. 2006), *available at* http://www.apa.org/about/division/cpmpubint2.html#8.

[9] *See* American Psychiatric Association, Mentally Ill Prisoners on Death Row, par. (d) (Dec. 2005), *available at* http://www.psych.org/edu/other_res /lib_archives/archives/200505.pdf.

life of one or more people" should not be executed. Report in Support of Resolution 122A (Aug. 2006).[10]

The report accompanying the 2006 ABA policy specifically addresses the type of situation at issue in this case. If an execution is to be consistent with retribution, the report states, the inmate should have "a deeper understanding of the state's justifying purpose" than mere knowledge that the execution's stated reason is his having been found guilty of the crime. *Id.*[11] So, to be competent to be executed, an offender:

> not only must be "aware" of the nature and purpose of punishment but also must "appreciate" its personal application in the offender's own case – that is, why it is being imposed *on the offender*. This formulation is analogous to the distinction between a "factual understanding" and a "rational understanding" of the reason for the execution.

Id.[12]

The Constitution requires this approach, in the ABA's view, because:

> Holding a person accountable is intended to be an affirmation of personal responsibility. Executing someone who lacks a meaningful understanding of the nature of this awesome punishment and its retributive purpose offends

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[10] *See* footnote 2, *supra,* at 676.

[11] *See* footnote 2, *supra*, at 675.

[12] *See* footnote 2, *supra*, at 675 (emphasis in original).

the concept of personal responsibility rather than affirming it.

Id.[13]

II. The Holding Of The Court Below Does Not Serve Capital Punishment's Retributive Purpose

In *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994), and the present case, the Fifth Circuit held that a death row inmate is competent to be executed if he knows that the State is going to execute him and that the State's ostensible reason for executing him is his conviction for one or more capital crimes. Under this approach, it is irrelevant if the offender, due to a serious mental disability, is under the delusion that, regardless of the State's announced rationale, he in fact is being executed for reasons having nothing to do with the crime. Thus, a paranoid schizophrenic who suffers from the delusion that he will be executed not as punishment for his crime but rather to stop him from preaching the Gospel would be considered competent for execution.

The Fifth Circuit's approach is flawed. Most important, it fails to recognize the distinction between, on the one hand, an inmate who lacks the capacity to accept responsibility for his acts and to acknowledge that the State is executing him as punishment for what he did and, on the other hand, an inmate who has that capacity but chooses to blame his execution on others (such as a witness he believes committed perjury).

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[13] *See* footnote 2, *supra*, at 676.

Where, as here, a death row inmate attributes his impending execution to reasons that only someone suffering from a significant mental disability could espouse -- such as a delusion that he is to be executed because of his faith in God -- he cannot be said to have the capacity to accept responsibility for his crimes. If the offender simply cannot understand the true reason a capital sentence is to be carried out against him, his execution would be inconsistent with the constitutional principles established in *Ford.*

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Dated: February 22, 2007

APPENDIX

APPENDIX A

ABA Criminal Justice Standard 7-5.6

Currently incompetent condemned convicts; stay of execution

(a) Convicts who have been sentenced to death should not be executed if they are currently mentally incompetent. If it is determined that a condemned convict is currently mentally incompetent, execution should be stayed.

(b) A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

APPENDIX B

EXCERPTS FROM ABA RESOLUTION 122A

ADOPTED BY THE HOUSE OF DELEGATES

August 8, 2006

RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to implement the following policies and procedures:

. . .

3. Mental Disorder or Disability after Sentencing

(a) *Grounds for Precluding Execution.* A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity . . . (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case. Procedures to be followed in each of these categories of cases are specified in (b) through (d) below.

. . .

(d) *Procedure in Cases Involving Prisoners Unable to Understand the Punishment or its Purpose.* If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the

punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to the sentence imposed in capital cases when execution is not an option.